FULLRISE RESOURCES SDN BHD

v.

NG AH TOH & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-50-2002]
19 MAY 2004

CIVIL PROCEDURE: *Summary possession of land - Triable issues - Whether first defendant trespasser or squatter - Whether first defendant entered into or remained in occupation of land with license or consent of plaintiff's predecessor in title - Whether proceedings should have been commenced by writ instead of originating summons - Whether an application under O. 89 Rules of the High Court 1980 suitable*

This was the plaintiff's application *via* an originating summons for vacant possession under O. 89 of the Rules of the High Court 1980 ('RHC') against the first defendant on the ground that the first defendant had been in occupation of the plaintiff's land without the plaintiff's license or consent. The first defendant alleged that he had occupied the land with the license or consent of the plaintiff's predecessor in title, one Ng Pian Neo, who had sworn a statutory declaration to that effect. The first defendant had also paid the assessment and electricity bills for the house where he had been staying for almost 60 years, during which he had incurred expenses in erecting and maintaining the house and infrastructure. The plaintiff submitted that the first defendant's 60-year stay with the consent or knowledge of the former lessee did not give him the right to occupy the land after the notice to quit had been served on him. The issue requiring determination was whether the first defendant was a trespasser or squatter so as to attract the application of O. 89 of the RHC, pursuant to which the plaintiff could obtain summary recovery of possession of the land.

Held (dismissing the application):

[1] Reverting to the facts of the instant application, in particular the allegations in the respective affidavits of the parties herein that the defendant had entered into or remained in occupation with the license or consent of one of the previous lessees, Ng Pian Neo, the defendant had raised a triable issue pertaining to his occupation or remaining on the land, which would make an O. 89 application eminently unsuitable. In the circumstances, the

proceedings herein should have been commenced by a writ as opposed to an originating summons, and the application could not be resolved by way of affidavit evidence, but had to be determined by reference to *viva voce* evidence, which was subject to cross-examination and re-examination in order to enable the court to give mature consideration to the controversies of fact. (p 310 c-e)

[Originating summons converted to a writ. Parties directed to file respective pleadings.]

Case(s) referred to:

Bohari Taib & Ors v. Pengarah Tanah Galian Selangor [1991] 1 CLJ 647; [1991] 1 CLJ (Rep) 48 SC ***(refd)***

Chiu Wing Wa & Ors v. Ong Beng Cheng [1994] 1 CLJ 313 SC ***(refd)***

Damansara Jaya Sdn Bhd v. Penghuni-penghuni Kuil Muneswaran Alayam atau Kuil Muniandy Maha Kali Alayam [1994] 1 CLJ 164 HC ***(refd)***

Holee Holdings (M) Sdn Bhd v. Chai Him & Ors [1997] 4 MLJ Supp 601 ***(refd)***

Immetec Sdn Bhd v. Yong Tai Hoong & Anor [1995] 1 MLJ 390 ***(refd)***

Laksamana Realty Sdn Bhd v. Yeo Tin Sang [1998] 5 CLJ 347 HC ***(dist)***

Punca Klasik Sdn Bhd v. All Persons in Occupation of the Wooden House Erected on a Portion of Land held under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor and Another Action (No 2) [1995] 4 BLJ 337 HC ***(dist)***

Seapower (M) Sdn Bhd v. Hotel Ambassador (M) Sdn Bhd [1990] 2 CLJ 1042; [1990] 3 CLJ (Rep) 69 HC ***(refd)***

Teh Bee v. K Maruthamuthu [1977] 2 MLJ 7 ***(refd)***

Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331 SC ***(foll)***

Titular Roman Catholic Bishop of Penang v. Stephen Ramachandran [1994] 3 MLJ 4 ***(refd)***

Toh Kheng Heng & Anor v. Ahmad Fauzi Mohd Taufek [1994] 1 CLJ 547 ***(dist)***

Legislation referred to:

National Land Code, ss. 221(3)(b), 340(1), (2), (3)

Rules of the High Court 1980, O. 14, O. 28 r. 8(1), O. 34, O. 89 r. 1

Other source(s) referred to:

Halsbury's Laws of Malaysia, vol 1, para 10-6-063

For the plaintiff - Lee Choon Hei; M/s Lim Chong Hock & Co

For the defendant - Yaackub Hj Mat; M/s Yaackub Mat & Assocs

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Application

This is the plaintiff's application by way of an originating summons in encl. (1) for vacant possession under O. 89 of the Rules of the High Court 1980 against the first defendant, on the ground that the first defendant has been in occupation of the plaintiff's land without the plaintiff's licence or consent.

A reference hereinafter to an order or rule is a reference to the order or rule in the Rules of the High Court 1980, unless otherwise stated to the contrary.

Background

This is derived from the affidavits filed herein and must be dealt with in that perspective and, in the absence of *viva voce* evidence and a mature consideration after cross-examination and re-examination, does not constitute a specific finding of facts.

The plaintiff is the registered lessee of the land held under Lots 215, 268 and 269, in the mukim of Bachang, in the district of Melaka Tengah ("the land").

The plaintiff alleged that the first defendant is a squatter who has entered upon the land without the plaintiff's licence or consent.

On 24 October 2001, the plaintiff through its solicitors served a notice to quit on the first defendant at No. 268-1, Jalan Solok, Sang Helang, Bachang, Melaka, but the first defendant has failed to deliver vacant possession to the plaintiff.

In the affidavit in reply, the first defendant alleged that he had occupied the land with the licence or consent of the plaintiff's predecessor in title, one Ng Pian Neo who has sworn a statutory declaration as the former lessee of Lots 268 and 269 mukim of Bachang, Melaka and that the first defendant's house was built on Lot 268. The plaintiff's predecessor is related to the first defendant through the marriage of the first defendant's sister to the younger brother of Ng Pian Neo, who owned a brick kiln built on the land and for whom the first defendant has been working for almost 30 years.

The first defendant has also paid the assessment and electricity bills for the house where he has been staying for almost 60 years, during which he has incurred expenses in erecting and maintaining the house and the infra-structures.

The plaintiff has annexed a copy of the State Lease in Form 15C for Lot 268, of which the plaintiff is the registered lessee for 81 years, until 9 March 2047. The State Lease also shows the original lease as Lease No. 23142 dated 30 October 1961 for 99 years. The State Lease stated the original lessees as, *inter alia*, Ng Pian Neo who owned 6/12 share thereof. The plaintiff became the registered lessee of the whole lot on 21 July 1993 after the former lessees sold the lease to the plaintiff.

Submission For Plaintiff

En. Michael Tan Lip Yip, who during his life time was the learned counsel for the plaintiff, submitted that Ng Pian Neo's statutory declaration to the effect that the first defendant has built the house with the plaintiff's consent was not true as the receipts for the assessment were issued in the name of Ng Pian Neo, for the years 1999 to 2002.

He added that even if the first defendant has been living in the said house for some 60 years, it only established that he was a gratuitous licensee whose licence can be revoked at any time, through the notice to quit.

It was also argued for the plaintiff that the first defendant has no legal right or equity to remain on the land as there was no inducement held out by the plaintiff and that the first defendant is a trespasser.

En. Lee Choon Hei, the learned successor to the aforesaid learned counsel, submitted that the first defendant's 60-year stay with the consent or knowledge of the former lessee does not give the first defendant the right to occupy the land after the notice to quit has been served on him, relying on *Punca Klasik Sdn Bhd v. All Persons in Occupation of the Wooden House Erected on a Portion of Land held under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor and Another Action (No 2)* [1995] 4 BLJ 337; *Laksamana Realty Sdn Bhd v. Yeo Tin Sang* [1998] 5 CLJ 347; s. 221(3), 340(1), (2) and (3) of the National Land Code 1965; *Teh Bee v. K. Maruthamuthu* [1977] 2 MLJ 7; *Immetec Sdn Bhd v. Yong Tai Hoong & Anor* [1995] 1 MLJ 390; *Toh Kheng Heng & Anor v. Ahmad Fauzi bin Mohd Taufek* [1994] 1 CLJ 547; *Holee Holdings (M) Sdn Bhd v. Chai Him & Ors* [1997] 4 MLJ 601.

First Defendant's Response

En. Yaackub bin Hj. Mat, learned counsel for the first defendant, relied on *Halsbury's Laws of Malaysia*, Vol. 1: *Civil Procedure*, para 10-6-063, to the effect that the summary procedure under O. 89 applies to a claim for possession of land which is occupied solely by a person or persons who entered or remained in occupation without the licence or consent of the person making the claim or that of any predecessor in title of his, and contended that the first

defendant is not a trespasser but was on the land with the consent of the predecessor in title Ng Pian Neo, citing *Seapower (M) Sdn. Bhd. v. Hotel Ambassador (M) Sdn. Bhd.* [1990] 2 CLJ 1042; [1990] 3 CLJ (Rep) 69. He added that the first defendant is not a trespasser and that O. 89 applies only to a trespasser, relying on *Chiu Wing Wa & Ors v. Ong Beng Cheng* [1994] 1 CLJ 313; *Titular Roman Catholic Bishop of Penang v. Stephen Ramachandran* [1994] 3 MLJ 4; *Bohari bin Taib & Ors v. Pengarah Tanah Galian Selangor* [1991] 1 CLJ 647; [1991] 1 CLJ (Rep) 48; and *Damansara Jaya Sdn. Bhd. v. Penghuni-Penghuni Kuil Muneswaran Alayam Atau Kuil Muniandy Maha Kali Alayam* [1994] 1 CLJ 164.

In the circumstances, he submitted that this is not a case to be decided under O. 89.

Decision Of The Court

Question For Determination

The question for determination by the court is whether the first defendant is a trespasser or squatter so as to attract the application of O. 89 pursuant to which the plaintiff may obtain summary recovery of possession of the land.

Principles Governing An O. 89 Application

Order 89 prescribes a summary procedure for possession of land. Order 89 r. 1 in particular reads as follows:

ORDER 89

SUMMARY PROCEEDINGS FOR POSSESSION OF LAND

> 1. Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

This summary procedure enables a person such as the registered owner or lessee of land to obtain an order for the recovery of his land which is wrongfully occupied by a trespasser or squatter ie, a person who has entered or remained in occupation without the registered owner's or lessee's licence or consent or that of any predecessor in title of his.

The Supreme Court in *Chiu Wing Wa, supra,* through the judgment of Mohamed Azmi SCJ (as he then was) enunciated the following principles:

(1) The summary procedure under O. 89 should not be allowed to apply where the entry to the land in the first instance is lawful, for in such a situation, there must necessarily be the facts and the law for determination by evidence *viva voce*;

(2) the summary procedure under O. 89 is governed by the same principles as those under O. 14;

(3) to entitle a defendant to a trial, all the defendant needs to do is to show that there is a triable issue of law or fact;

(4) it is only in clear cases of trespass that a summary order can be made under O. 89;

(5) an application under O. 89 should be dismissed if there are triable issues of fact and law, as such an application for vacant possession ought to have been commenced by writ; and

(6) for the purpose of the summary procedure under O. 89, a distinction should be made between squatters simpliciter who have no rights whatsoever and occupiers with licence or consent, as well as tenants and licensees holding over: Bohari, SC, *supra*; *Immetec*, HC, *supra.*

Considertion Of Plaintiff's Authorities

I shall now consider the authorities cited for the plaintiff in order to determine the support which the plaintiff may derive therefrom.

In *Punca Klasik, supra,* the plaintiffs were the registered proprietors of the land which they had bought from the trustees of the estate of Syed Hassan with the intention of developing it. The plaintiffs discovered that there were houses erected on the land and occupied by individuals without their permission. Notices of demand for vacant possession were issued to the occupants of the houses. The notices were neglected and so the plaintiff applied under O. 89 for vacant possession of the land. Two defendants *viz.* Lim and Ng entered memoranda of appearance and contended that they were the owners of two separate portions of land that formed part and parcel of the land which had since been registered in the plaintiff's name. The two defendants contended that they have bought that portion from one Syed Ali, while the other defendant contended that his father had bought the other portion from one Syed Abdullah as reflected in a written agreement dated in 1951. Both Syed Ali and Syed Abdullah were beneficiaries of a trust property. The issue before the court was whether the purported sale agreements were valid to pass title to the defendants. Abdul Malik Ishak J held, *inter alia*, that as beneficiaries of a trust, Syed Ali

and Syed Abdullah lacked the authority to enter into a legally enforceable contract to sell that trust property, and hence granted vacant possession under O. 89. The facts therein were not similar to those in the instant application.

Laksamana Realty, supra, concerns a tenancy coupled with equity which was limited to a 30-year period and which has been satisfied under s. 221(3)(b) of the National Land Code 1965. It was not a decision based on O. 89 and so has no relevance to the instant application.

The plaintiff's reliance on s. 340 of the National Land Code 1965 which regulates the indefeasibility of title in favour of the registered proprietor of land is academic in the sense that in the application before me there is no dispute as to the plaintiff's title to the land as a registered lessee. There is no practical necessity for the plaintiff to invoke s. 340 at all.

In *Teh Bee, supra,* the plaintiff claimed possession of land of which she was the registered proprietress on the basis that the defendant was a trespasser. After a full hearing at the trial of the action, the learned magistrate gave the plaintiff vacant possession, but on appeal, the learned judge set aside the order for vacant possession. On further appeal, the Federal Court through the judgment of Ali Ag. CJ(M) restored the learned magistrate's order for vacant possession. The crucial fact is that vacant possession was given to the plaintiff after a full trial and not summarily.

The defendants in *Immetec Sdn Bhd, supra,* were squatters residing in a wooden house on part of the plaintiffs land. On 9 June 1991, the plaintiff entered into an agreement with the first defendant whereby the first defendant was alloted a flat at RM25,000 and that the defendants were to leave the house upon being given the notice to quit issued by the plaintiff. The defendants had in March 1994 started storing goods and equipment around the house without the plaintiff's consent. The plaintiff applied by way of summons in chambers for, *inter alia,* a mandatory injunction that the defendants vacate and leave the wooden house and the plaintiff's land forthwith. It was contended for the defendants, *inter alia,* that the procedure used in the plaintiff's application was wrong in that the plaintiff ought to have applied under O. 89. I held, *inter alia,* that the plaintiff was not obliged to make its application under O. 89 as O. 89 does not prescribe a mandatory provision since the words used were "the proceedings may be brought ...". In any event, it was not an application under O. 89, and so no support can be derived therefrom.

In *Toh Kheng Keng, supra,* the plaintiffs were registered owners of the land which they had bought from the previous owner with vacant possession. The defendant's affidavit in reply stated that it was not possible that the plaintiffs had bought the land from the previous owner with vacant possession. Selventhiranathan JC (now J) held, *inter alia,* that the defendant did not seek to confer or claim any higher status as to his occupation of the land than as a gratuitous licensee, and that the licence to occupy the land was properly terminated when the notice to quit was served on him. That being the case, vacant possession of the land was given to the plaintiff under O. 89.

Reverting to the allegations of fact in the instant application, it is to be noted that the defendant's affidavit herein did show that the defendant was on the land allegedly with the consent of the predecessor in title. It is plain to me that there are distinguishable allegations of fact between *Toh Kheng Keng* and the instant application.

The issues in *Holee, supra,* do not revolve around O. 89 at all and so I do not feel the need to delve further into that case.

Having considered all the authorities relied on by the plaintiff, I am of the view that they are neither helpful to nor supportive of the plaintiff's case.

Is O. 89 Applicable?

It is instructive to analyse some of the relevant judgments of our courts.

In *Seapower (S), supra,* the plaintiff bought the Ambassador Hotel ("H") at a public auction. The previous owner has granted H a 10-year registered lease from 1966 with an option to renew. On the expiry of the 10-year term, H remained in occupation at all material time but no new lease was executed nor registered. H did not comply with the notice to quit. S filed an application under O. 89 to recover vacant possession. Wan Adnan bin Ismail J (later PCA) held that the defendants went into occupation of the property with the consent of the previous owner and were a tenant holding over, as a result of which O. 89 did not apply. This judgment was approved by the Supreme Court in *Chiu Wing Wa, supra,* which also concerns a tenant holding over.

In *Titular Roman Catholic Bishop of Penang, supra,* the plaintiff was the registered owner of the land on which stood premises occupied by, *inter alia,* the defendant and his family. The plaintiff instituted summary proceedings under O. 89 for possession of the premises on the ground that they were in occupation without licence or consent. The defendant contended that the premises was built by his wife's great-grandfather and that his wife's family had lived in it for over a century. Selventhiranathan JC (later J) followed *Bohari, supra,* and *Chiu*

Wing Wa, supra, and held that there were disputes of fact which could not be resolved on affidavit evidence alone, thereby dismissing the plaintiff's application under O. 89.

The plaintiff in *Damansara Jaya Sdn Bhd. supra,* became the registered owner in 1990 of the land on which was erected a Hindu temple with the consent of the previous owner.

Mahadev Shankar J (later JCA) dismissed the plaintiffs application under O. 89, following *Bohari, supra*.

Reverting to the facts of the instant application, in particular the allegations in the respective affidavits of the parties herein that the defendant has entered into or remained in occupation with the licence or consent of one of the previous lessees, Ng Pian Neo, who had sworn a statutory declaration to that effect, the defendant has in my view raised a triable issue pertaining to his occupation or remaining on the land, in which case on the basis of the authorities which I have analysed herein, I am of the view that an O. 89 application is eminently unsuitable.

In the circumstances, I hold that the proceedings herein should have been commenced by a writ as opposed to an originating summons, and that the application cannot be resolved by way of affidavit evidence, but it has to be determined by reference to *viva voce* evidence, which is to be subject to cross-examination and re-examination in order to enable the court to give mature consideration to the controversies of fact.

Conversion To Writ

In exercise of my power under O. 28 r. 8(1), I hereby order that the originating summons be converted to a writ in accordance with the principle enunciated in *Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd* [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331 SC. The parties herein are directed to file their pleadings, with the plaintiff's statement of claim on or before 1 June 2004 and the defendant's statement of defence on or before 15 June 2004.

Case Management

As a pro-active measure, I shall treat the instant proceedings by way of case management under O. 34, under which I hereby order the plaintiff's counsel to file the following seven sets of documents on or before 19 September 2004.

1. Bundle of pleadings of both the plaintiff and the defendant;
2. Agreed bundle of documents;
3. Non agreed bundle of documents;
4. Statement of agreed facts;
5. Statement of non-agreed facts;
6. Witness' statement by way of examination-in-chief; and
7. Issue or issues for determination by the court.

Hearing of the full trial is now fixed for 5, 6 and 7 October 2004.